

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Office of the Governor,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 739 C.D. 2011
	:	
Mark Scolforo,	:	Argued: December 14, 2011
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

**OPINION BY
JUDGE COHN JUBELIRER¹**

FILED: June 7, 2012

The Office of Governor (Governor's Office) petitions for review of the Final Determination of the Office of Open Records (OOR) granting access to the Governor's schedule from January 18, 2011 to February 4, 2011 (Calendars), without redactions, as requested by Mark Scolforo² (Requestor) pursuant to the Right-to-Know Law (RTKL).³ The Governor's Office asserts it properly redacted entries on

¹ This matter was reassigned to the authoring judge on April 20, 2012.

² Requestor is with the Associated Press.

³ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101 - 67.3104.

the Calendars, such as the subject of internal meetings, pursuant to Section 708(b)(10) of the RTKL, 65 P.S. § 67.708(b)(10) (the predecisional deliberative exception), and the deliberative process privilege.⁴

Requestor submitted a request, pursuant to the RTKL, to the Governor's Office for the Governor's Calendars and emails. (Right-to-Know Request (Request), R.R. at 6a.) Specifically, Requestor sought "copies of Gov. Tom Corbett's schedule from inauguration day until the date when this request is fulfilled" and "all emails sent by the [G]overnor since Jan. 18, 2011" (Emails). (Request, R.R. at 6a.) After invoking a 30-day extension, the Governor's Office granted, in part, and denied, in part, the Request. The Governor's Office provided some records it deemed responsive to the Request at no charge, but withheld what it deemed "non-public information." (Right-to-Know Response (Response) at 1-2, R.R. at 8a-9a.) The Governor's Office explained that it redacted one personal telephone number from the produced Emails pursuant to Section 708(b)(6)(i) of the RTKL, 65 P.S. §67.708(b)(6)(i), as personal identification information. (Response at 1, R.R. at 8a.) The Governor's Office further explained that it did not produce "E-mails that reflected internal predecisional deliberations" pursuant to Section 708(b)(10) and the executive and deliberative

⁴ The Governor's Office uses the terms "deliberative process privilege" and "executive privilege" interchangeably. See Van Hine v. Department of State, 856 A.2d 204, 212 (Pa. Cmwlth. 2004) (observing that the similarities of the deliberative process privilege and executive privilege are apparent, and viewing the two doctrines as "coterminous."). In addition to Section 708(b)(10), the Governor's Office did separately list both the executive privilege and the deliberative process privilege, pursuant to Section 305(a)(2) of the RTKL, 65 P.S. § 67.305(a)(2), as additional exemptions to the disclosure of the requested information from the Calendars. However, the Governor's Office, in its brief to this Court, does not develop a legal analysis regarding the application of the executive privilege separate and apart from the deliberative process privilege.

privileges. (Response at 1, R.R. at 8a.) Finally, the Governor's Office redacted from the Calendars any information that:

- (1) reflected internal predecisional deliberations pursuant to [Section 708(b)(10)] and the executive privilege and deliberative privilege[,]
[Sections 102 and 305(a),] 65 P.S. §§ 67.102, [67.]305(a), such as the subject of meetings;
- (2) is exempt under the personal security exemption, [Section 708(b)(1)(ii)], 65 P.S. § 67.708(b)(1)(ii), such as the location of the Governor's travel lodging or travel patterns;
- (3) is exempt as a personal telephone number, [pursuant to Section 708(b)(6)(i)], 65 P.S. § 67.708(b)(6)(i); and
- (4) is not a record of the agency, such as personal[,]
social or medical appointments.

(Response at 1-2, R.R. at 8a-9a.) Overall, the Governor's Office withheld 17 Emails in their entirety, redacted a telephone number from one Email, and redacted 28 entries on the Calendars. (Final Determination at 8, R.R. at 116a.) The Governor's Office did not redact from the Calendar entries the names of individuals who attended the meetings, or the dates, times and places of the meetings.

Requestor appealed to the OOR challenging the application of the stated exceptions and privileges to the Request. (OOR Appeal at 1-2, R.R. at 37a-38a.) The OOR permitted both parties to supplement the record. The Governor's Office submitted notarized affidavits signed by Open Records Officer Michael Downing and Corporal Bruce George of the Pennsylvania State Police to support the grounds set forth in its Response, along with exemption indices related to all records redacted or withheld. (Governor's Office Letter (March 23, 2011), R.R. at 70a-93a.) The

affidavits accompanied the Governor's Deputy General Counsel's position statement outlining the asserted exceptions. (Governor's Office Letter (March 23, 2011) at 1-7 and Appendices B and C, R.R. at 70a-76a, 88a-93a.) Therein, the Governor's Office requested a hearing should the OOR need any additional information. (Governor's Office Letter (March 23, 2011) at 7, R.R. at 76a.) The OOR denied the Request on April 5, 2011, stating it could not hold a hearing based on "a finding that sufficient evidence was not supplied." (Final Determination at 3, R.R. at 111a (internal citation omitted).)

The OOR issued its Final Determination denying the appeal as to the Emails and granting access, without redactions pursuant to Section 708(b)(10), to the Calendars. (Final Determination at 1-13, R.R. at 109a-21a.) Without considering the Affidavit of Open Records Officer Michael Downing (Affidavit), the OOR determined that the Governor's Office could not redact the subject matter of internal meetings for discussion on the Calendars under the predecisional deliberative exception in Section 708(b)(10) of the RTKL. (Final Determination at 8-10, R.R. at 116a-18a.) Specifically, the OOR held *as a matter of law* that:

the factual topic of a meeting with the Governor is facially not "deliberative" in character as such a notation does not, in itself, reveal the actual deliberations. While deliberations themselves may be protected, a record showing when such deliberations are scheduled are not protected under [Section 708(b)(10)]. This holding comports with the underlying purpose of the RTKL "to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." Bowling [v. Office of Open Records], 990 A.2d 813,] 824 [(Pa. Cmwlth. 2010) (en banc), *petition for allowance of appeal granted in part*, 609 Pa. 265, 15 A.3d 427 (2011)]. The OOR finds that the general topics discussed by an elected public official in the course of fulfilling his or her public responsibilities are the type of information that the

General Assembly intended to be subject to public access. While the deliberations themselves may be withheld under [Section 708(b)(10)], this narrow exemption does not extend to shield the subject matter of scheduled discussions from public release.

(Final Determination at 9-10, R.R. at 117a-18a.) Finally, the OOR determined that the executive privilege did not apply “to prevent access to the responsive [C]alendar entries.” (Final Determination at 12, R.R. at 120a.) The OOR, thus, directed the Governor’s Office to provide the requested Calendars, without redactions, for all information withheld on the basis of Section 708(b)(10) and/or privilege.⁵ (Final Determination at 13, R.R. at 121a.) The Governor’s Office timely filed a Petition for Review with this Court.⁶

In support of this appeal, the Governor’s Office argues that the OOR erred by holding, as a matter of law, that it is not possible for the subject matter of meetings on the Governor’s Calendar to reflect predecisional deliberations under Section 708(b)(10). The Governor’s Office argues that the subject matter of internal meetings on the Calendars are records that *reflect* internal predecisional deliberations;

⁵ The OOR also determined that: (1) a “[r]equest may only seek records in existence at the time the [r]equest was received” by the agency; (2) a “[r]equest may only seek „records”” as that term is defined in the RTKL, thus, portions of the Governor’s Calendars were properly redacted to shield the Governor’s personal activities; (3) the Governor’s Office properly redacted personal telephone numbers and email addresses; and (4) the Governor’s Office properly redacted information pursuant to Section 708(b)(1)(ii) of the RTKL, the personal security exception. (Final Determination at 4-7, R.R. at 112a-15a.)

⁶ In reviewing a final determination of the OOR, this Court “independently reviews the OOR’s orders and may substitute its own findings of facts for [those] of the agency.” Bowling, 990 at 818. As we are not limited to the rationale offered in the OOR’s decision, we enter narrative findings and conclusions based on the evidence, and we explain our rationale. Id. Our scope of review on a question of law under the RTKL is plenary. Allegheny County Department of Administrative Services v. A Second Chance, Inc., 13 A.3d 1025, 1029 n.3 (Pa. Cmwlth. 2011).

therefore, this information is exempt from disclosure pursuant to Section 708(b)(10) of the RTKL and the deliberative process privilege pursuant to Section 102 of the RTKL.⁷ The Governor's Office contends further that the OOR erred by determining that the factual topic of a meeting is facially not deliberative in character because notations showing when an event is scheduled cannot, in itself, reveal the actual deliberations. (Governor's Office Br. at 12.) The Governor's Office emphasizes that the withheld information was not a list of general topics discussed by the Governor. The disclosure sought was the subject of the meeting in the context of the identities of internal participants who were chosen to be part of the deliberations, which were disclosed, as well as the time, date, and place of those deliberations, which was also disclosed. In short, the Governor's Office argues that the OOR erred by requiring that the protected information *reveal* the deliberations because Section 708(b)(10) only requires that those deliberations be *reflected*, not revealed or described.

In response, Requestor argues that all exemptions from disclosure must be narrowly construed. Requestor contends that the subject matter of internal meetings on the Calendars are not generally exempt from disclosure as reflecting internal predecisional deliberations pursuant to Section 708(b)(10). The fact that the RTKL utilizes the term *reflect* is of no moment as the term *reveal* is an appropriate synonym. Requestor contends that the Governor's Office has simply redacted all of the notations of the subject matter of internal meetings without any attempt to explain the separate basis for each redaction. Finally, Requestor contends that the subject

⁷ Section 102 defines "privilege" as "[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of the Commonwealth." 65 P.S. § 67.102.

matter of internal meetings on the Governor's Calendars do not reflect or show the actual advice he was given at those meetings; therefore, they are not protected even if the Governor's Office had met its burden under the RTKL.

The predecisional deliberative exception set forth in Section 708(b)(10)(i) codifies the deliberative process privilege. Section 708(b)(10)(i) exempts from disclosure:

(10)(i) A record that reflects:

(A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.

65 P.S. § 67.708(b)(10)(i). “According to the language of Section 708(b)(10)(i), protected records must be predecisional and deliberative.” Kaplin v. Lower Merion Township, 19 A.3d 1209, 1214 (Pa. Cmwlth.), petition for allowance of appeal denied, ___ Pa. ___, 29 A.3d 798 (2011).⁸ Pursuant to Section 708(a)(1), “[t]he

⁸ The OOR consistently applies the following test to determine if a requested record is exempt pursuant to Section 708(b)(10) of the RTKL: (1) “the deliberations reflected are „internal“ to the agency”; (2) “the deliberations reflected are predecisional, i.e., before a decision on an action”; and (3) “then contents are deliberative in character, i.e., pertaining to a proposed action.” (Final Determination at 7, R.R. at 115a.) See Kaplin, 19 A.3d at 1216 (holding that “a communication does not necessarily need to be internal to a single agency to be covered by the predecisional deliberation protections of Section 708(b)(10)(i)” because, pursuant to the statutory language, “the
(Continued...)”)

burden of proving that a record of a Commonwealth agency . . . is exempt from public access shall be on the Commonwealth agency . . . receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1).

Upon review, we find that the OOR erred by holding, as a matter of law, that the topic of a meeting with an agency executive, such as the Governor, written on a calendar “is facially not „deliberative” in character” and, therefore, cannot be exempt from disclosure because such information, in itself, would not reveal the actual deliberations. (Final Determination at 9-10, R.R. at 117a-18a.) Calendar entries are unique in that they are commonly used for more than just scheduling appointments. Calendars may contain the topic of the meeting, along with specific points that are to be discussed, or proposed actions, along with a list of the individuals scheduled to attend the meeting. For example, a calendar entry may set forth a description of what will be discussed at a meeting, such as a proposed tax or fee, controversial proposed legislation, or regulations. This information would expose the Governor’s Office’s predecisional deliberations with respect to “[t]he strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.” Section 708(b)(10)(i)(B) of the RTKL, 65 P.S. § 708(b)(10)(i)(B). The OOR erroneously assumes that, because the information appears in a calendar entry, it could never contain information subject to protection. However, we must look at the substance of the information and not the form in which the information is placed. The fact that information is contained in a calendar, instead of a memo, does not determine the character of the information or whether it is subject to an exception.

communication could be considered to be predecisional deliberations between agency members and employees of another agency”).

As such, the fact that the information was placed in a calendar entry does not, as a matter of law, mean that it is impossible for it to be protected under an exception to the RTKL.

In determining whether the information in the Calendar entries falls within the exception to disclosure of public records set forth in Section 708(b)(10), we must first examine the statutory provision. In doing so, we recognize that the General Assembly utilized the specific term “*reflect*,” 65 P.S. § 67.708(b)(10) (emphasis added), and did not use the term “*reveal*.” The term *reflect* means “mirror” or “show,” while the term *reveal* means “to make publicly or generally known” or, in other words, “disclose.” Webster’s Third New International Dictionary 1908, 1942 (2002). Given the broad meaning of the term *reflect*, as opposed to *reveal*, and the fact that the General Assembly chose the term *reflect* when providing for the predecisional deliberative exception, we must interpret the exception as written. Moreover, the combined use of the terms *reflects* and *deliberations* in Section 708(b)(10)(i)(A) supports the conclusion that Section 708(b)(10)(i) codifies the deliberative process privilege and, therefore, demonstrates the General Assembly’s intent to exempt the deliberative *process*. Commonwealth ex rel. Unified Judicial System v. Vartan, 557 Pa. 390, 399, 733 A.2d 1258, 1263 (1999) (plurality opinion) (quoting Redland Soccer Club, Inc. v. Department of the Army of the United States, 55 F.3d 827, 853 (3d Cir. 1995) (“The deliberative process privilege permits the government to withhold documents containing „confidential *deliberations* of law or

policymaking, *reflecting* opinions, recommendations or advice.” (internal citation omitted) (emphasis added))).⁹

Given our understanding of the exception, we next must determine whether it was error for the OOR not to consider the Affidavit which the Governor’s Office submitted in support of the redactions from the Governor’s Calendars. The Governor’s Office argues that the sworn Affidavit is evidence and that the information at issue “reflects the Governor’s deliberations and priorities in choosing the subjects, timing, location and participants of meetings. It is the totality of these components that renders this calendar information reflective of deliberative process . . .” (Governor’s Office Br. at 7.)

In response, Requestor argues that the Affidavit had no relevance to the application of Section 708(b)(10)(i), as that involves a purely legal issue. Requestor contends that none of the Affidavit’s factual representations are, or could be, relevant to the threshold legal question of whether Calendar entries disclosing the subject matter on which the Governor sought advice, as opposed to the content of the advice he ultimately received, are deliberative for purposes of the internal predecisional deliberative exception.

⁹ In Vartan, 557 Pa. at 401, 733 A.2d at 1264, the Supreme Court required an agency asserting the deliberative process privilege to show that: (1) the communication is deliberative in character; and (2) the communication occurred prior to a specific, related decision. See also Joe v. Prison Health Services, Inc., 782 A.2d 24, 33 (Pa. Cmwlth. 2001) (same). Cf. LaValle v. Office of General Counsel of the Commonwealth, 564 Pa. 482, 496, 769 A.2d 449, 457 (2001) (“[T]his Court has not definitively adopted the deliberative process privilege.”) and In Re: Interbranch Commission on Juvenile Justice, 605 Pa. 224, 237-38 & n.11, 998 A.2d 1269, 1277-78 & n.11 (2010) (Supreme Court addressed the deliberative process privilege in excluding evidence sought in Judicial Conduct Board hearing).

The RTKL establishes that an appeals officer “may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. The appeals officer may limit the nature and extent of evidence found to be cumulative.” Section 1102(a)(2) of the RTKL, 65 P.S. § 67.1102(a)(2).

Here, the Affidavit attests to facts which arguably could support the exceptions asserted by the Governor’s Office. (Affidavit at 1-2, R.R. at 88a-89a.) Whether information qualifies as “predecisional and deliberative” is a highly fact specific inquiry and discerning whether material redacted pursuant to the RTKL is exempt from access is difficult. Here, the content of the redactions is contested, and the agency is entitled to show why its asserted protection applies. In deciding whether this redacted information qualifies for protection under an exception, the OOR should have determined the content of the redactions: the OOR could not make an informed decision here without any knowledge regarding the content of the Affidavit. Therefore, it was error for the OOR not to consider the Affidavit submitted in support of the redactions from the Governor’s Calendars.

As this Court reviews the Affidavit as part of the record on appeal,¹⁰ we now turn to the issue of whether the evidence presented meets the Governor’s Office’s burden of proving that the redacted notations are exempt from disclosure pursuant to

¹⁰ See Department of Transportation v. Office of Open Records (Aris), 7 A.3d 329, 333 (Pa. Cmwlth. 2010) (holding that the General Assembly “intended the record to be certified to this Court pursuant to Section 1303(b) [of the RTKL, 65 P.S. § 67.1303(b),] to include evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2)” of the RTKL, 65 P.S. § 67.1102(a)(2)).

Section 708(b)(10)(i). The federal courts have explained what is required when an agency, by submitting affidavits, attempts to justify nondisclosure of requested documents pursuant to certain exemptions provided for in Section 552 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the federal counterpart to Pennsylvania's RTKL.¹¹

Affidavits are the means through which a governmental agency details the search it conducted for the documents requested and justifies nondisclosure of the requested documents under each exemption upon which it relied upon. The affidavits must be detailed, nonconclusory, and submitted in good faith. . . . Absent evidence of bad faith, the veracity of an agency's submissions explaining reasons for nondisclosure should not be questioned.

Manchester v. Drug Enforcement Administration, U.S. Department of Justice, 823 F. Supp. 1259, 1265 (E.D. Pa. 1993) (citations omitted). The Manchester court further explained that “[i]n camera inspection may be appropriate if agency affidavits insufficiently detail the justification for nondisclosure, thereby preventing a meaningful review of the cited exemptions.” Id.

Due to the nature of the exceptions and privileges set forth in the RTKL and the protection that inures to exempted or privileged information, the RTKL permits the OOR to, *sua sponte*, undertake an *in camera* review. See Section 1102(b)(3) of the RTKL, 65 P.S. § 67.1102(b)(3) (the OOR “shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute.”); See also, e.g., Levy v. Senate of Pennsylvania, 34 A.3d 243, 246 (Pa. Cmwlth. 2011) (en banc)

¹¹ See Bowling, 990 A.2d at 819 (recognizing that the FOIA is the federal counterpart to our RTKL).

(court conducted *in camera* review to assess attorney-client privilege), petition for allowance of appeal granted, __ Pa. __, __ A.3d __ (No. 834 MAL 2011, filed May 14, 2012). Explaining the deliberative nature of a communication set forth in a calendar or other similar records without disclosing deliberative content may be difficult in an affidavit. In such cases, the circumstances may necessitate *in camera* review. See Kaplin, 19 A.3d at 1213 (trial court conducted *in camera* review to assess predecisional deliberative exception). We conclude that the circumstances presented in this case necessitate an *in camera* review.

Here, the Affidavit submitted by the Governor's Office concludes that "the information redacted was for internal meetings . . . and reflected predecisional deliberations with regard to the subject matter reflected on the index." (Affidavit at 2, R.R. at 89a.) The Affidavit also states that all the redactions at issue:

were reflective of internal deliberations that preceded decisions related to subjects including the transition into the new administration, personnel, budgetary and policy decisions, related courses of actions and implementation of changes in the direction of the administration.

(Affidavit at 2, R.R. at 89a.) This Affidavit makes the minimally sufficient showing of the exception, pursuant to Section 708(b)(10)(i), and is clear enough to permit the OOR to ascertain through an *in camera* review whether the information reveals the Governor's predecisional deliberations. See Bowling, 990 A.2d at 825 (agencies must make a minimally sufficient showing of an exemption). Specifically, the Affidavit states that the notations are internal to the agency, predecisional, and deliberative. Moreover, in assessing whether Section 708(b)(10)(i) applies to the subject matter of the internal meetings listed on the Calendars, the OOR should ascertain, when conducting the *in camera* review, whether disclosure of the subject

matter of the internal meetings would expose to public view the deliberative process of the Governor's Office. Notably, the disclosure of even purely factual material contained in the Calendars could also disclose the Governor's deliberative process in these circumstances. See Russell v. Department of Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) ("[D]isclosure of even purely factual material would reveal an agency's decision-making process.").

We recognize that the exemptions from disclosure must be narrowly construed due to the RTKL's remedial nature, which is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions." Bowling, 990 A.2d at 824. Nevertheless, in order to justify the exemption, an agency cannot be required to disclose the very information it seeks to protect because that would eviscerate the exemptions provided for in the RTKL.¹²

¹² We note that this Court, in Bowling, held that it was within the discretion of the Pennsylvania Emergency Management Agency (PEMA), pursuant to Section 705 of the RTKL, 65 P.S. § 67.705, to choose the manner in which it would disclose certain requested records; however, in so doing, we offered the following guidance:

[W]e refer PEMA to two approaches which the federal courts use when addressing an agency's claim of disclosure exemption under the FOIA. First, the District of Columbia Circuit Court of Appeals established in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir., 1973), an item-by-item indexing system which correlates to a specific FOIA exemption.

The second approach recognized that a "Vaughn index" may not be a practical approach in view of the records requested. *In some instances, a satisfactory index could undermine the exemption and, in those cases, agencies may proffer generic determinations for nondisclosure.* Curran v. Dep't of Justice, 813 F.2d 473 (1st Cir. 1987); see also Crooker v. Bureau of Alcohol, Tobacco & Firearms, 789 F.2d 64 (D.C. Cir. 1986). *This does not, however, absolve agencies from making a*

(Continued...)

Accordingly, that portion of the OOR's Final Determination directing the Governor's Office to provide the Governor's Calendars from January 18, 2011 to February 4, 2011, without redactions for all information withheld on the basis of Section 708(b)(10) of the RTKL and/or privilege, is vacated and this matter is remanded to the OOR to conduct an *in camera* review of the redacted Calendar entries in order to determine, in accordance with this opinion, whether the predecisional deliberative exception set forth in Section 708(b)(10)(i) of the RTKL applies.¹³

RENÉE COHN JUBELIRER, Judge

minimally sufficient showing of exemption. Curran. Agencies may justify their exemptions on a category-of-document by category-of-document basis. Id. The chief characteristic of a category-of-document methodology must be functionality, that is, the classification should be clear enough to permit a court to ascertain "how each . . . category of documents, if disclosed, would interfere with [the agency's duty not to disclose exempt public records]." Id. at 475.

Bowling, 990 A.2d at 825 n.13 (emphasis added) (omission in original).

¹³ We note that other states have ordered an *in camera* review of the records for which the governor was claiming a privilege because the evidence was insufficient to determine whether the record might be privileged under that state's right-to-know law. See, e.g., Office of the Governor v. Washington Post Co., 759 A.2d 249 (Md. 2000) (Newspaper sought governor's appointment records and phone records pursuant to the Maryland Public Information Act; court ordered *in camera* review of unredacted appointment schedules and phone records because the evidence, consisting of affidavits and a sampling of the requested information, was insufficient to determine whether the records might be privileged under the act.); Herald Association, Inc. v. Dean, 816 A.2d 469 (Vt. 2002) (Publishers filed request for governor's daily schedule pursuant to Vermont's Access to Public Records Act; court determined, in part, that due to governor's blanket assertion of privilege over his entire schedule, rather than ordering the governor to disclose the entirety of his schedule, the matter had to be remanded to provide the governor the opportunity to make a prima facie case specific to any requested entries that the executive privilege applied.).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Office of the Governor,	:	
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Petitioner	:	
	:	
v.	:	No. 739 C.D. 2011
	:	
Mark Scolforo,	:	
	:	
Respondent	:	

ORDER

NOW, June 7, 2012, the Final Determination of the Office of Open Records is VACATED, in part, in accordance with the foregoing opinion, and this matter is REMANDED to the Office of Open Records to conduct an *in camera* review of the redacted Calendar entries of the Governor's Office in order to determine whether the predecisional deliberative exception set forth in Section 708(b)(10)(i) of the Right to Know Law, 65 P.S. § 67.708(b)(10)(i), applies.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge

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v.	:	Argued: December 14, 2011
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BEFORE: HONORABLE DAN PELLEGRINI, President Judge
 HONORABLE BERNARD L. McGINLEY, Judge
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 HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE PATRICIA A. McCULLOUGH, Judge

DISSENTING OPINION
BY JUDGE SIMPSON

FILED: June 7, 2012

I respectfully dissent. For the following reasons I would affirm the Office of Open Records' (OOR) Final Determination that granted access to meeting topics noted in the Governor's calendars requested pursuant to the Right-to-Know Law (RTKL),¹ although I would do so on a rationale which is different than that adopted by OOR.

The Governor's Office submitted an affidavit and a letter from counsel to support its redaction of the meeting topics from the Governor's calendar, based on the predecisional deliberative exception. The affidavit concludes that "the information redacted was for internal meetings ... and reflected predecisional deliberations with regard to the subject matter reflected on the

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

index.” Reproduced Record (R.R.) at 89a. The affidavit also states that all the redactions at issue:

... were reflective of internal deliberations that preceded decisions related to subjects, including the transition into the new administration, personnel, budgetary and policy decisions, related courses of actions and implementation of changes in the direction of the administration.

Id.

I agree with the majority that the predecisional deliberative exception set forth in Section 708(b)(10)(i) of the RTKL, 65 P.S. §67.708(b)(10)(i), codifies the deliberative process privilege. First, agencies must show the withheld communication occurred prior to a deliberative decision. Joe v. Prison Health Servs., Inc., 782 A.2d 24, 33 (Pa. Cmwlth. 2001). Second, agencies must submit evidence of specific facts showing how the withheld information relates to a particular decision. Id. Accordingly, an agency must identify a decision to establish the privilege. “The government must present more than a bare conclusion or statement that the documents sought are privileged.” Id. at 33-34.

The deliberative nature of the Governor’s Office’s redactions must be shown with more precision than offered here. The affidavit states the internal and predecisional qualities, but presupposes rather than proves their deliberative nature. Further, and particularly significant to my analysis, the Governor’s Office did not pinpoint any decision or policy to which the redactions relate. Also critical to its burden, the agency did not attempt to explain how the redactions reflect and play a

role in agency decision-making. The Governor's Office thus failed to establish factually or persuade logically that the redacted information is "deliberative."

The majority concludes that "This Affidavit makes the minimally sufficient showing of the exception," but it then remands to OOR "to ascertain through an *in camera* review whether the information reveals the Governor's predecisional deliberations." Majority Slip Op. at 13.

I disagree that a remand for a second fact-finding process at OOR is an appropriate response to an insufficiently detailed agency affidavit. The majority, citing Manchester v. Drug Enforcement Administration, U.S. Department of Justice, 823 F. Supp. 1259 (E.D. Pa. 1993) (addressing the federal Freedom of Information Act) for this proposition, is creating a new, time-consuming process which rewards vagueness and burdens requesters.²

Worse, the parties here did not request *in camera* review, and no party complained that the current record was inadequate. To the contrary, the Governor's Office contended that its affidavit was sufficient to carry its burden of proving the basis for its redactions.

² Cases relied upon by the majority are readily distinguishable based on aspects of other states' open records laws that have no counterpart in Pennsylvania's RTKL. See Office of the Governor v. Washington Post Co., 759 A.2d 249, 272 (Md. 2000) (in request for governor's calendar, case remanded so court could conduct statutory balancing test); Herald Ass'n, Inc. v. Dean, 816 A.2d 469, 475 (Vt. 2002) (in request for governor's calendar, presumed confidentiality can be overcome by a showing that requester has need for documents that outweighs the interest in confidentiality).

Under these circumstances, the majority's approach ignores our Supreme Court's direction in LaValle v. Office of General Counsel of the Commonwealth, 564 Pa. 482, 769 A.2d 449 (2001). In LaValle, the Office of General Counsel (OGC) denied access under the former RTKL to a report, partly on the basis of the deliberative process privilege. The Supreme Court stated that "the agency should be required to provide sufficiently detailed information concerning the contents of the requested document to enable a reviewing court to make an independent assessment of whether it meets the statutory requirements for mandatory disclosure." Id. at 497, 769 A.2d at 458 n.13. The Court further stated, "That OGC may have erred by failing to provide sufficient explanation, however, does not entitle the Senators to relief, where they have failed to challenge the adequacy of such record on appellate review." Id.

Moreover, as to the availability of *in camera* review, the Court stressed "the importance of preserving the question of the adequacy of the record in the agency and raising it specifically on appellate review." Id. at 498, 769 A.2d 458 n.14. The Court reasoned that the Commonwealth Court should develop standards to ensure that state agencies provide sufficiently detailed information concerning the contents of requested records to permit meaningful appellate review. Id. "This can be most effectively accomplished where the question is placed in controversy before the court, and the court is thus provided with the informed views of the parties concerning the extent of detail required and the manner in which its development should occur at both the agency level and on appellate review." Id.

Here, the Governor's Office did not question the adequacy of the record, it did not request *in camera* review, and we lack the informed views of the parties concerning the extent of detail required and the manner in which its development should occur. As a result, this Court is not developing standards to ensure state agencies provide sufficiently detailed information. In these ways we may be straying from our Supreme Court's guidance.

Lastly, I disagree with the majority when it cites a 1982 District of Columbia Circuit case³ for the proposition that disclosure of even purely factual material could disclose the deliberative process. This is not the law in Pennsylvania. Rather, Pennsylvania courts construing the deliberative process privilege do not shield purely factual material. Commonwealth ex rel. Unified Judicial Sys. v. Vartan, 557 Pa. 390, 399, 733 A.2d 1258, 1263 (1999) (plurality opinion); Van Hine v. Dep't of State, 856 A.2d 204 (Pa. Cmwlth. 2004). "Information that is purely factual, even if decision-makers used it in their deliberations is usually not protected." Van Hine, 856 A.2d at 212 (citing Vartan). Only information that constitutes "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice" is protected as "deliberative." In re Interbranch Comm'n on Juvenile Justice, 605 Pa. 224, 237, 988 A.2d 1269, 1277-78 (2010) (quoting Vartan, 557 Pa. at 399, 733 A.2d at 1263).

For these reasons, I disagree with the majority's decision to require a second fact-finding exercise by the OOR. I would affirm the OOR's Final

³ Russell v. Dep't of Air Force, 682 F.2d 1045 (D.C. Cir. 1982).

Determination based on the alternate rationale that the Governor's Office's affidavit lacks detail and is too conclusory to support the asserted exception.

ROBERT SIMPSON, Judge

Judge McGinley and Judge Leavitt join in this dissenting opinion.